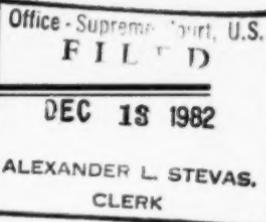


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NO.

in the
Supreme Court
of the
United States

MIKE LEE VIERTHALER,
KURT ARTHUR VIERTHALER, and
SCOTT ERRICO

Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT**

J. DAVID BOGENSCHUTZ
VARON and STAHL, P.A.
2432 Hollywood Boulevard
Hollywood, Florida 33020
Telephone: (305) 923-1548

Attorneys for Petitioners

QUESTION PRESENTED

**21 U.S.C. §955a and b IS OVERLY BROAD,
VAGUE, INDEFINITE, AND ABRIDGES
SPECIFIC TREATIES THE UNITED STATES
HAS RATIFIED WITHOUT EXPRESSLY
DECLARING AN INTENTION TO
ABROGATE OR MODIFY SAID TREATIES.**

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Judgment and Opinion of the Court Below	2
Statement of Jurisdiction	2
Constitutional Articles, Amendments and Statute Involved	2
Statement of the Case	3
Reasons for Granting the Writ	3
Conclusion	8
Appendix	App. 1, 2

TABLE OF AUTHORITIES

	Page
<i>United States v. Esteban Marino-Garcia, filed for Certiorari on November 6, 1982</i>	7

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**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT**

To: The Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States.

Petitioners, Mike Lee Vierthaler, Kurt Arthur Vierthaler and Scott Errico, pray a Writ of Certiorari issue to review a final judgment of the Court of Appeals for the Eleventh Circuit affirming their conviction in the United States District Court for the Southern District of Florida.

**JUDGMENT AND OPINION
OF THE COURT BELOW**

In a per curiam non-published opinion, the Court of Appeals affirmed the Petitioners' convictions.

JURISDICTION OF THIS COURT

This Petition is filed within sixty (60) days of the Court of Appeals denial of the Petitioner's petition for rehearing on October 14, 1982.

The jurisdiction of this Court is invoked, made and conferred under Title 28 U.S.C. §1254(1) and Rules 17 through 23 of this Court's rules.

**CONSTITUTIONAL ARTICLES, AMENDMENTS,
STATUTES, AND TREATIES INVOLVED**

First, Fourth, Fifth and Ninth Amendments;

Article I; United States Constitution

21 U.S.C. §955 Convention on the High Seas (1958)

STATEMENT OF THE CASE

The Petitioners were convicted after a bench trial of one count of possession of marijuana with the intent to distribute in violation of 21 U.S.C. §955a and 18 U.S.C. §2. On appeal they challenged the constitutionality of 21 U.S.C. §955a which was denied in a non-published opinion.

REASONS FOR GRANTING THE WRIT

In 1980 Congress enacted 21 U.S.C. §955a for the purpose of assisting the United States Coast Guard in its enforcement of the laws relating to the importation of controlled substances. The Senate Report stated the Statute would give the Justice Department the maximum prosecutorial authority permitted under International Law.

The Statute unnecessarily infringes upon the constitutional right of freedom of association guaranteed by the First Amendment. The Statute is overly broad prohibiting conduct which Congress does not have the legislative power to punish. The Statute conflicts or abridges a specific Treaty ratified by the United States; however, the Statute does not expressly state an intention to abrogate or modify said Treaty.

Subsection (a) of the Statute does not limit its applicability to persons intending to distribute the controlled substance within the United States. A person, whether a United States citizen, or alien on board a "vessel of the United States" or on a "vessel subject to the jurisdiction of the United States" may be prosecuted

even though the intended distribution point is a foreign jurisdiction, even if the substance is legal in the foreign jurisdiction.

Subsection (b) of the Statute prohibits a United States citizen from being on board any vessel containing a controlled substance, even though the intended distribution point is a foreign jurisdiction where such substance is legal.

Subsection (c) of the Statute prohibits the possession of any controlled substance on any vessel within the customs waters of the United States even if the vessel and the cargo are destined for a foreign jurisdiction where possession of said substance is legal.

Subsection (d) of the Statute prohibits any person, whether a United States citizen or alien, from possessing or manufacturing a controlled substance anywhere in the world, even though said act does not have a *present* effect within the territory of the United States.

All of the aforementioned subsections are intended to reach acts committed outside the territorial jurisdiction of the United States. Persons are subject to the Statute even though they have acted solely extraterritorially and even though their acts have no *present* effect within the United States.

The definitional section, 21 U.S.C. §955b is vague and indefinite. Subsection (c) which defines the term "vessel of the United States" is overly broad. The Statute states that a vessel owned by a United States citizen, in whole or in part, or a corporation within the

laws of the United States, shall be considered a vessel of the United States, even though it flies the flag of a foreign country unless the vessel has been granted nationality by a foreign nation in accordance with Article 5 of the Convention on the High Seas (1958). The Statute allows the United States to exercise jurisdiction over a foreign-flag vessel granted nationality by a foreign nation, if it has not done so in accordance with Article 5 of the Convention on the High Seas (1958). All the nations of the world have not signed or ratified the Convention on the High Seas (1958). Failure to sign or ratify the Convention does not authorize the United States to exercise jurisdiction over vessels of those countries who have not signed or ratified the Convention.

Subsection (d) of the 955b provides that a vessel without nationality is subject to the jurisdiction of the United States. A foreign national aboard a vessel without nationality, who possesses a controlled substance with the intent to distribute it in a foreign jurisdiction wherein the substance is lawful is subject to prosecution pursuant to §955a(a).

The Statute abridges or conflicts with the Convention on the High Seas (1958) which regulates the jurisdiction of war ships (i.e., Coast Guard vessels) on the high seas. Under Article 11, Clause 2 of the Constitution, treaties are a part of the supreme law of the land. Congress has the power to abrogate or modify a treaty by a subsequent treaty or statute. However, if Congress intends to abrogate or modify a treaty by statute, that intention should be clearly and expressly set forth.

Nowhere within the language of the Statute, nor within its legislative history, does Congress express an

intention to abrogate or modify the Convention on the High Seas (1958). In fact, Congress referred to portions of the Convention in the definitional section of the Statute.

21 U.S.C. §955a conflicts with the Convention in the following respect. Article 2 of the Convention states that the high seas are open to all nations and no state may validly purport to subject any part of them to its sovereignty. The Convention provides that United States warships may interfere with foreign merchant ships where (1) the foreign ship is engaged in piracy, or (2) the foreign ship is engaged in the slave trade, or (3) the foreign ship is in reality the same nationality as the war ship. The Statute permits a broader range of search and seizure by the United States Coast Guard than the three exceptions specified by the Convention.

The Petitioner's cause should be joined with that raised by the Petitioner in *United States v. Esteban Marino-Garcia* who filed for certiorari before this Court on November 6, 1982.

CONCLUSION

The constitutionality of 21 U.S.C. §955a and §955b is a matter of great public importance because it has extended the arm of United States law enforcement without regard for International law or our prior treaty obligations.

Respectfully submitted,

J. DAVID BOGENSCHUTZ, ESQ.
VARON and STAHL, P.A.
2432 Hollywood Boulevard
Hollywood, Florida 33020
Telephone: (305) 923-1548

Attorneys for Petitioners

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5497

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

KURT ARTHUR VIERHALER,
MIKE LEE VIERHALER, and
SCOTT ERRICO,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Florida.

ON PETITION FOR REHEARING

(OCT 14 1982)

Before VANCE and JOHNSON, Circuit Judges, and
ALLGOOD, District Judge.*

IT IS ORDERED that the petition for rehearing
filed in the above entitled and numbered cause by Kurt
Arthur Vierthaler and Mike Lee Vierthaler be and the
same is hereby Denied.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

*Hon. Clarence W. Allgood, U.S. District Judge for the Southern
District of Alabama, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5497

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KURT ARTHUR VIERHALER,
MIKE LEE VIERHALER, and
SCOTT ERRICO.

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Florida.

ON PETITION FOR REHEARING

(OCT 14 1982)

Before VANCE and JOHNSON, Circuit Judges, and
ALLGOOD, District Judge.*

IT IS ORDERED that the petition for rehearing
filed in the above entitled and numbered cause by
Appellant Scott Errico, be and the same is hereby
Denied.

ENTERED FOR THE COURT:

/s/

United States Circuit Judge

*Hon. Clarence W. Allgood, U.S. District Court Judge for the
Northern District of Alabama, sitting by designation.

Supreme Court, U.S.
FILED

DEC 30 1982

ALEXANDER L. STEVENS
CLERK

NO. 82-985

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MIKE LEE VIERTHALER,
KURT ARTHUR VIERTHALER, and
SCOTT ERRICO,

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vs.

UNITED STATES OF AMERICA,

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SUPPLEMENTAL APPENDIX TO PETITION FOR
WRIT OF CERTIORARI TO THE COURT OF
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J. DAVID BOGENSCHUTZ
VARON and STAHL, P.A.
2432 Hollywood Boulevard
Hollywood, Florida 33020
Telephone: (305) 923-1548
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IN THE UNITED STATES CIRCUIT COURT
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NO. 81-5497

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

KURT ARTHUR VIERHALER,
MIKE LEE VIERHALER,
SCOTT ERRICO,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(August 19, 1982)

Before VANCE and JOHNSON, Circuit Judges, and
ALLGOOD*, District Judge.

PER CURIAM:

Appellants were convicted after a bench trial of
one count of possession of marijuana on board an American

*Honorable Clarence W. Allgood, U.S. District Judge
Northern District of Alabama, sitting by designation.

vessel with intent to distribute, in violation of 21 U.S.C. §955a and 18 U.S.C. §2. On appeal they raise two arguments, neither of which is meritorious. We affirm.

On November 20, 1980, a Coast Guard cutter spotted the WINDY TOO, a small American sailing vessel out of Fort Lauderdale, Florida, in international waters approximately sixteen miles from the Bahamas. The captain of the Coast Guard vessel decided to inspect the WINDY TOO and sent a boarding party to that ship. While circling the WINDY TOO, the boarding party saw bales of an unidentified substance through open windows in the ship. Once on board the sailboat the boarding party saw many bales of marijuana in plain view through an open hatch into the cockpit area. The three people aboard were arrested and a general search revealed that the boat contained over 18,400 pounds of marijuana.

Appellants raised two arguments. First, they contend that section 955a is unconstitutional because it does not require proof of intent to distribute narcotics in the United States. They argue in essence that due process considerations prohibit application of American criminal laws to their conduct absent some proof of a nexus with the United States. This argument, however, has recently been foreclosed by our decision in *United States v. Riker*, 670 F.2d 987, 988 (11th Cir. 1982), where we upheld the constitutionality of section 955a against a similar challenge.

Appellants also contend that the evidence was insufficient to convict them. Relying heavily upon the decision in *United States v. MacPherson*, 644 F.2d 69

(5th Cir. 1981), appellants argue that the government only proved that they were present on board the WINDY TOO, and that mere presence is insufficient to sustain their convictions. We disagree with appellants' characterization of the evidence. The evidence showed that they were on board a small boat in which over nine tons of marijuana were stored in plain view all over the ship. Unlike the defendant in *MacPherson*, none of the appellants here can seriously contend that they were unaware of the marijuana and the illegal purpose of the voyage. It is clear that more than "mere presence" has been established in this case and that the government introduced sufficient evidence to sustain the convictions. See *United States v. Riker*, 670 F.2d at 989; *United States v. Mazyak*, 650 F.2d 788, 790-91 & n.2 (5th Cir. 1981), cert. denied, ____ U.S. ___, 102 S.Ct. 1281 (1982); *United States v. DeWeese*, 632 F.2d 1267, 1271-72 (5th Cir. 1980), cert. denied, ____ U.S. ___, 102 S.Ct 358 (1981).

AFFIRMED.